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IN THE

Supreme Court of the United States

October Term, 1957

No. 614

N. H. LYONS & CO., INC.,
Appellant,

against

ISADOR LUBIN, as Industrial Commissioner of the State of New York,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	PAGE
Jurisdictional Statement	1
(a) The official and unofficial reports	1
(b) Jurisdiction	2
(c) The following questions are presented by this appeal	4
(d) Statement of the case	6
The New York Minimum Wage Law	9
The Enactment of Section 663a	11
Manner in Which Federal Questions Were Raised	13
(e) The federal questions are substantial	14
POINT I—It is essentially arbitrary that the rights of any one should be fixed by a board which considers the circumstances of others, and lacks power to consider his own. For that reason Section 663-a, in providing that men's wages shall be based solely on inquiry into the circumstances of women, lacks due process. As Governor Lehman said in his veto message, "The industries affected [are denied] any opportunity to be heard"	14
POINT II—In permitting the employment of handicapped women at less than prescribed minimum wages, while forbidding such employment of handicapped men, the statute denies the employers of handicapped men the equal protection of the laws	17
POINT III—To equate men's wages with those of women in an activity which does not employ women, has never employed women and is forbidden by law to employ women, does not protect women and hence, on the facts of this case, does not "have a real and substantial relation to the object sought to be obtained" by the Minimum Wage Law	19

PAGE

POINT IV—The purported remedy under Section 110 is illusory; that remedy cannot be used to secure exemption for employees once Section 663-a is held constitutional, and the Court ruled against its invocation as concerns the inclusion of plaintiff's lodging houses 20

Why questions require plenary consideration .. 23

(i) A copy of the judgment appealed from 23

APPENDIX:

A—Majority Opinion of Court of Appeals 1a

B—Dissenting Opinion in Court of Appeals 7a

C—Opinion at Special Term 10a

D—Veto Message of Governor Lehman 15a

E—Article 19 of Labor Law 17a

F—Section 110 of Labor Law 29a

G—Multiple Dwelling Law 30a

H—Regulations Governing Conduct and Maintenance of Lodging Houses 31a

I—Original and Amended Remittiturs (Judgments) of the Court of Appeals 32a

Table of Cases Cited

Adkins v. Children's Hospital, 261 U. S. 525 20

Charleston Association v. Alderson, 324 U. S. 182 .. 3

Hoeper v. Tax Commissioner, 284 U. S. 206 17

Matter of Diocese of Rochester v. Planning Bd. of Brighton, 1 N. Y. 2d 508 21

Morgan v. United States, 298 U. S. 468 17

Nebbia v. New York, 291 U. S. 502, 525 19

People ex rel. Tipaldo v. Morehead, 270 N. Y. 233, affirmed 298 U. S. 587 ..... 11, 13

PAGE

Queenside Hills Co. v. Saxl, 328 U. S. 80 3

Southern Ry. Co. v. Greene, 216 U. S. 400 18

Stettler v. Oregon, 243 U. S. 629 20

West Coast Hotel Co. v. Parrish, 300 U. S. 379 ..11, 15, 16

Statutes Cited

New York State Statutes

Labor Law, Article 3:
Section 110 ..... 4, 20, 21, 23

Labor Law, Article 19:
Section 650 ..... 9, 11
Section 651 10
Section 653 ..... 10, 11
Section 654 ..... 10, 11
Section 655 ..... 10, 11
Section 656 10
Section 658 ..... 5, 11
Section 660 11
Section 662-a 21
Section 663-a 3, 4, 5, 8, 9, 11, 12, 13, 14, 15, 20, 21, 22
Section 664 11
Section 665 11

Multiple Dwelling Law, Article 3:
Section 4, Subdivision 14 4
Section 66, Subdivision 5 ..... 4, 6

New York City Lodging House Regulations:
Section 4(e)(4) 4, 7
Section 4(o) 4, 7

United States Code

	PAGE
Title 28, Section 1257(2)	2
Title 29, Section 214	17

Acts Cited by Popular Name

Fair Labor Standards Act, 29 U. S. C. § 214	17

Other Authorities Cited

Charter of the City of New York, Section 885	6, 8
Constitution of New York, Article VI, Section 1	2
Industrial Bulletin, April 1957	12
Monthly Labor Review, January, 1956	12
Occupational Wage Survey of New York, April 1957 Bulletin No. 1202-17	12
United States Constitution, Amendment 14	3, 4, 14
Veto Message of Governor Lehman	4, 9, 12, 13, 14, 16

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(a) The official and unofficial reports.

The opinion of the Special Term is reported at 203 Misc. 160 and at 116 N. Y. S. 2d 520. It is printed as Appendix C to this Statement, pp. 10a-14a.

There was no opinion in the Appellate Division. Its decision is noted at 286 App. Div. 1065 and at 146 N. Y. S. 2d 663.

The majority opinion in the Court of Appeals is reported at 3 N. Y. 2d 60 and at 163 N. Y. S. 2d 677; it is printed as Appendix A to this Statement, pp. 1a-6a. The dissenting opinion is reported at 3 N. Y. S. 2d 68 and at 163 N. Y. S. 2d 682; it is printed as Appendix B to this Statement, pp. 7a-9a.

(b) Jurisdiction.

(i) The action was brought in the Supreme Court of the State of New York pursuant to Article VI, Section 1, of the Constitution of New York providing in part as follows:

> "The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article."

(ii) The judgment sought to be reviewed was entered on May 24, 1957 by the Court of Appeals. The notice of appeal was filed on August 2, 1957 in the office of the Clerk of the County of New York, who is ex officio Clerk of the Supreme Court of the State of New York, County of New York, the Court then possessed of the record. The time within which the case might be docketed and the jurisdictional statement and record filed was extended to and including November 15, 1957, by Hon. Saul S. Streit, Justice of the Supreme Court of New York, on September 12, 1957 (awaiting action by the Court of Appeals on appellant's motion to amend the remittitur).

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court is Title 28, Section 1257(2), of the United States Code, providing that this Court has jurisdiction of final judgments rendered by the highest court of a state,

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(iv) This is a suit against a public officer charged with the enforcement of a state statute to enjoin such enforcement on the ground that the statute is unconstitutional, in

violation of the Fourteenth Amendment to the United States Constitution. The highest court of the state has entertained appellant's claim on the merits, denied the injunction and upheld the validity of the statute. That Court has expressly amended its remittitur to show that such a claim was made, *infra*, p. 14. Under the circumstances the jurisdiction of this Court by way of appeal appears from the following passage in *Charleston Association v. Alderson*, 324 U. S. 182, at pp. 185-186:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134; Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 551; Saltonstall v. Saltonstall, 276 U. S. 260, 267; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Nickey v. Mississippi, 292 U. S. 393, 394; Whitfield v. Ohio, 297 U. S. 431, 435-6."

A suit by a New York lodging house proprietor to enjoin enforcement of another statute on the ground of violation of the Fourteenth Amendment was considered by this Court on the merits. *Queenside Hills Co. v. Saxl*, 328 U. S. 80.

(v) The statute challenged in this case is Section 663-a of Article 19 of the Labor Law of the Consolidated Laws of New York, reading as follows:

> "Section 663-a. *Supplementary protection.* To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors, no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order. The provisions of sections six

hundred sixty, six hundred sixty-two, six hundred sixty-three, six hundred sixty-four, and six hundred sixty-five of this article shall apply to any employer or his agent, or officer or agent of any corporation failing to comply with the provisions of this section or any minimum wage order."

This statute was originally enacted as Section 563-a by Chapter 792 of the Session Laws of 1944; it was renumbered 663-a and amended by Chapter 353, Section 2, of the Session Laws of 1948.

Section 663-a is found at Volume 30, p. 505 of McKinney's Consolidated Laws.

Due to the relevance of "Article 19—Minimum Wage Standards for Women and Minors" of the Labor Law, the Article in its entirety is printed as Appendix E to this Statement, pp. 17a-28a.

Also there printed as appendices are (1) The message of Governor Lehman vetoing in 1942 a bill identical with Section 663-a, Appendix D, pp. 15a-16a; (2) Section 110 of the Labor Law, referred to in the opinion of the Court of Appeals, Appendix F. p. 29a; (3) Section 4, subdivision 14, and Section 66, subdivision 5, of the Multiple Dwelling Law, which defines and regulates lodging houses, Appendix G, p. 30a; (4) Sections 4(c)(4) and 4(o) of New York City Lodging House Regulations, forbidding the employment and the lodging of women, Appendix H, p. 31a; and (5) the original and amended remittiturs (judgments) of the Court of Appeals, Appendix I, pp. 32a-35a.

(c) The following questions are presented by this appeal:

(1) Article 19 of the Labor Law of the State of New York provides for the fixing of minimum wages for women and minors by a wage board after hearing evidence relevant to, and considering, the wants, welfare and earning capacities of women and minors. No statute authorizes

the board to hear evidence relevant to, or to consider, the wants, welfare or earning capacities of men. Under such circumstances, is Section 663-a, a statute that forbids the employment of men in any occupation at less than the minimum wages fixed for women and minors in such occupation, repugnant to the 14th Amendment to the Constitution of the United States?

(2) The State of New York has never found that men require minimum wage protection and has enacted no statute fixing, or providing for the fixing, of minimum wages for men. Under such circumstances, is Section 663-a of the Labor Law of New York, a statute that forbids the employment of men in any occupation at less than the minimum fixed for women and minors in such occupation, repugnant to the 14th Amendment to the Constitution of the United States when applied to a distinctive segment of an industry that does not employ women and minors, has never employed women and minors, and is forbidden by law to employ women and minors?

(3) Article 19 of the Labor Law of the State of New York, providing for the fixing of minimum wages for women and minors, provides (Section 658) for the issuance, to women whose earning capacity is impaired, of licenses authorizing employment at wages less than the minimum wage rates otherwise applicable. Under the circumstances stated in question No. 3 and the additional circumstances stated herein, is Section 663-a of the Labor Law, a statute that forbids the employment of men in any occupation at less than the minimum fixed for women and minors in such occupation without similar—or, indeed, any—provision respecting men of impaired earning capacity, repugnant to the 14th Amendment to the Constitution of the United States when applied to employers of men of impaired earning capacity?

In addition to stating the questions presented by this appeal, it is necessary to identify one question *not* presented by this appeal. The question *not* presented is whether a general minimum wage law for men is constitutional. Appellant does not challenge the constitutionality of such a law. As put in appellant's brief in the Court of Appeals (p. 13):

> "We wish to make it crystal clear that our case does not rest upon the proposition that a minimum wage act for men could not be passed by the New York Legislature without offending due process or other constitutonal safeguards, and part of our argument predicates invalidity of section 663-a on the fact that it is *not* a minimum wage law for men with the safeguards that would no doubt be afforded men and their employers by such a statute."

(d) Statement of the case.

The lodging houses. Plaintiff, operator of a number of lodging houses in New York City (fols. 225-6), brought this action on behalf of itself and of all other lodging houses (fol. 15).

New York lodging houses are defined and regulated both by state law, Article 3, especially Section 66 thereof, of the Multiple Dwelling Law (Appendix G, p. 30a), and by municipal regulations issued by the Department of Buildings of the City of New York pursuant to Section 885 of the New York City Charter (cf. Appendix H, p. 31a).

Basically, the lodging houses supply extremely cheap accommodations to unfortunate and nearly destitute men. As noted by the Court of Appeals, their rates are 35¢ to 60¢ a night (1a).

The lodging houses are able to do so because they employ the services of the lodgers themselves, necessarily at low rates, *infra*, p. 7... In short, the lodging houses are a kind of "do-it-yourself" affair by which poverty stricken drifters are able to find modest housing and to

avoid having to sleep in the streets, parks and public institutions.

Plaintiff's and other lodging houses do not have rooms, but open dormitories or cubicles (fol. 92). At the time of trial (September-October, 1952) the average price paid for lodging house accommodations was 45¢ per night (fol. 110). The lodging houses do not provide food, cooking facilities, or even elevators (fols. 161-2).

The lodgers. The lodgers are men from the lowest economic strata; they are feeble and decrepit, usually because of age and in some instances from drink (fol. 104). (Chronic alcoholics are, however, excluded [fol. 105].) Such meager funds as they possess come mostly from old age pensions, but also, in some instances, from relief payments, casual employment and "maybe" panhandling (fols. 104-5).

The lodgers' cleanliness is "not of the best" and they rarely wear nightclothes (fols. 107, 109).

The lodging houses do not accommodate women (fol. 94). Indeed, they are forbidden to do so. Section 4(o), New York City Lodging House Regs. (Appx. H, p. 31a). Women are permitted access to the lodging houses only under special circumstances and then with an escort (fol. 95).

The lodging house employees; prohibition against the employment of women. The lodging houses find their employees from among the lodgers themselves (fol. 111). Because of the handicap of age and weakness, these lodgers do not command good wages (fols. 168-9).

The lodging houses do not now employ women and have never employed women (fols. 194, 231, 247). They are forbidden to employ women by Section 4(e)(4) of the New York City Lodging House Regulations promulgated by the

Department of Buildings (under authority of Section 885 of the City Charter) which provides (Appendix H, p. 31a):

> "In any lodging house in which accommodations are provided for male lodgers, no female servants shall be employed."

Mandatory Order 6-a. Article 19 of the New York Labor Law, discussed *infra*, pp. 9-11 in greater detail, provides for minimum wages for women. Pursuant to this Article, a wage board promulgated minimum wages for women in the hotel industry—"Mandatory Order 6-a". The order defined "hotels" so as to include lodging houses. The wages specified in this order were greater than the lodging houses paid their employees (fols. 168-9). The amended complaint seeks injunctive relief against enforcement of both Mandatory Order 6-a and Section 663-a.

Mandatory Order 6-a, according to its terms, applies *exclusively* to women and minors. Its applicability to plaintiff and its employees derives wholly from Section 663-a.

Since the trial Mandatory Order 6-a has been superseded by Mandatory Order 6-c. In this respect Mandatory Order 6-c provides:

> "Employees. 'Employees' shall mean a woman 21 years of age and over and all workers of either sex under the age of 21 years employed in the hotel industry by the operator of the establishment or by any other employer. (Note: No male 21 years of age or over may be paid less than the rates fixed for women and minors; other requirements of this Order also apply.)"

That is, Mandatory Order No. 6-c, although purporting to apply only to women and minors, carries a notation as to the effect of Section 663-a.

These orders are quite detailed and deal, in addition to money compensation, with such matters as meals, shifts and uniforms, presumably on the theory that these are included in the term "wages".

The New York Minimum Wage Law

Protection of women and minors exclusive. The Law is designed to protect women and minors exclusively, and its elaborate wage fixing processes are based entirely on the needs, pay and employment of women and minors.

New York has never found that the wages of men are unduly low or that men, in respect of wages, require statutory protection of any kind.

Section 663-a is not an exception. If is entitled "Supplementary Protection," the context showing that protection for women supplementary to that elsewhere provided in Article 19 was intended. Moreover, the "Factual Background" (Section 650) upon which the statute is based, relates entirely to women and children. And it would indeed be arbitrary, if the protection of men were the purpose, to select for protection only those men employed in industries with respect to which a minimum wage order for women and children has been issued.

Analysis of Law. The New York Minimum Wage Law for women and minors, enacted in 1937, is Article 19 of the Labor Law, including Sections 650-666 thereof. Section 663-a, applying to men, became a part thereof upon its enactment in 1944 as Chapter 792 of the Laws of that year.

Governor Lehman, in vetoing on April 11, 1942 a bill identical with Section 663-a, said in part (Appendix D, p. 15a):

> "The present law which was adopted in 1937 is the result of long and careful study and draftsmanship by many distinguished experts in the field of minimum wage legislation. * * * Our law provides for the establishment of minimum wages for women and minors only."

The detailed "Factual Background" stated in Section 650 (Appendix E, pp. 17a-18a) refers only to women and

minors. The "Factual Background" finds that in some instances women and minors are being paid unreasonably low wages. It defines the purpose of the law as "to provide adequate maintenance and to protect the health of women and minors; and to protect the public interest of the community at large in their health and well-being." Neither Article 19 nor any other statute has any similar finding with respect to men wherever employed.

By Section 651 (Appendix E, p. 18a), "It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health."

Section 653 (Appendix E, p. 19a) authorizes the Industrial Commissioner to investigate wages paid women and minors throughout the state, and to require employers of women and minors to state the amount of wages paid to them. The Commissioner has no similar powers with respect to men's wages and employers.

Section 654 (Appendix E, pp. 19a-20a) authorizes the Commissioner, if he believes women and minors are being paid in sufficient wages in any occupation, to appoint a wage board. He has no similar power with respect to men.

Section 655 (Appendix E, p. 20a) deals with the procedure of wage boards. Again, the wage board has the power to investigate the wages of women and minors, and the power and duty to recommend minimum wage standards for women and minors.

Section 658 (Appendix E, p. 24a) authorizes the Commissioner to issue to "*a woman or minor,* including a learner or apprentice, *whose earning capacity is impaired by age or physical or mental deficiency or injury,*" a special license to work at less than the minimum wages otherwise applicable. No similar authority exists with respect to men whose earning capacity is similarly impaired.

The Enactment of Section 663-a

Section 663-a (Appendix E, pp. 26a-27a) is in issue here. That section makes applicable to men, as a matter of law, whatever minimum wages may be fixed for women and minors in any occupation. Section 663-a also makes applicable to employers of men the *enforcement* provisions of Article 19, but does not incorporate with respect to men, Sections 650, 653, 654, 655 and 658 heretofore discussed. The enforcement provisions are Sections 660 (publication of names of offending employers), 663 (duty of affected employers to keep records), 664 (criminal punishment) and 665 (civil penalties) (Appendix E, pp. 24a-25a, 26a, 27a-28a, 28a).

Section 663-a was not enacted as part of the original Minimum Wage Law. That Law was adopted in 1937. A previous Minimum Wage Law had been adopted in 1933 (L. 1933, c. 584) after extensive investigation and hearings. The 1933 Law had been declared unconstitutional by the New York Court of Appeals in *People ex rel. Tipaldo* v. *Morehead*, 270 N. Y. 233, affirmed by this Court, 298 U. S. 587. After the decision by this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, on March 29, 1937 the New York Legislature enacted the present Law (L. 1937, c. 276) which is similar to the 1933 Law. Section 663-a was added in 1944 (L. 1944, c. 792).

Unlike the Minimum Wage Law, the enactment of Section 663-a was not preceded by investigation and hearings. No testimony was ever taken, no findings were ever made that the enforcement of the law was in any respect imperfect, that women were losing their jobs to men or that in any way the objective of the Law was suffering because men were not bound by wage orders issued pursuant to the Law. Indeed, Section 663-a was enacted during World War II when women were rapidly taking over men's jobs.

Nor did appellee in the present case offer any evidence either in court or by way of judicial notice that minimum wage orders applicable to women only, deprived women of their jobs or that failure to cover men impaired the efficacy of the Law in any way. Appellee did not even speculate or theorize as to how the applicability of wage orders to handicapped men working in activities barred to women could protect the minimum wages of women.

In passing it might be observed that Section 663-a seems singularly pointless. Men are ordinarily paid more than women, even for similar work. That fact is implicit in the "Factual Background" of the Law. It appears in official publications both of the Federal Government, such as Bulletin No. 1202-17 "Occupational Wage Survey—New York, New York April, 1957" recently issued by the Bureau of Labor Statistics, and of New York State, such as the January 1956 issue of "Monthly Labor Review" giving statistics with respect to earnings in the hotel and laundry industries, and the Industrial Bulletin, issued April, 1957 with respect to earnings in the beauty service industry. Section 663-a would necessarily have practical effect only with respect to handicapped men such as appellant's employees.

Governor Lehman's veto of the bill identical with Section 663-a is, we submit, of unusual significance.

Governor Lehman was Governor of New York from January, 1933 to December 1942. He had been active in the drafting of the Minimum Wage Law of 1933—and at that time minimum wages were a very live issue. His brother, Chief Judge Irving Lehman of the Court of Appeals, had written a twenty-page dissenting opinion in the *Tipaldo* case, 270 N. Y. 239-259, an opinion which foreshadowed this Court's decision in the *West Coast Hotel* case. After that decision Governor Lehman successfully

sponsored the present Minimum Wage Law with the 1937 Legislature. Governor Lehman's veto message appears in full as Appendix D, pp. 15a-16a.

Governor Lehman's message explained why he vetoed the bill. Whereas "the present law * * * is the result of long and careful study by many distinguished experts," the bill "*was drafted without any consideration of the problems involved*" (p. 16a). The message quoted a statement by the New York State Federation of Labor opposing the bill because in New York men, by collective bargaining, had "secured wages and conditions that are superior to those in most of the other states in this country", and the bill "*could do naught but harm*" (p. 16a). The Governor continued, saying that the bill "contains none of the carefully worked out procedures of the present law [and] *deprives the industries affected of any opportunity to be heard*" (p. 16a).

Manner in which federal questions were raised.

The federal questions were first raised in the original complaint. They were again raised in the amended complaint, which is in the printed record, as follows (fols. 37-38):

> "WHEREFORE, plaintiff demands judgment as follows: * * *
>
> "Enjoining and restraining defendant from taking any steps or proceedings to enforce said Mandatory Orders No. 6 and 6a against plaintiff, plaintiff's lodging house, and lodging houses and persons similarly situated.
>
> "3. Decreeing and declaring that the provisions of Section 663-a of the Labor Law of the State of New York, Article 19, are unconstitutional and void, and unenforceable."

In all courts below arguments that Section 663-a was repugnant to the Fourteenth Amendment to the Constitution were advanced in support of this demand.

The Court of Appeals has so certified by its amended remittitur, as follows (Appendix I, p. 35a):

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, to wit, whether Section 663-a and Article 19 of the Labor Law, of which it is a part, interfered with plaintiff's right of contract and violated plaintiff's rights under the due process and under the protection provisions of the 14th Amendment. This Court held that plaintiff's constitutional rights were not violated."

(e) The federal questions are substantial.

The argument below will demonstrate that the federal questions are substantial:

POINT I

It is essentially arbitrary that the rights of any one should be fixed by a board which considers the circumstances of others, and lacks power to consider his own. For that reason Section 663-a, in providing that men's wages shall be based solely on inquiry into the circumstances of women, lacks due process. As Governor Lehman said in his veto message, "The industries affected [are denied] any opportunity to be heard.".

The hypothesis of Article 19 as declared in Section 650, "Factual Background", is that men and women are different, that their respective employment conditions are different, that women's wages are, in some instances, insufficient "to protect health" and "not fairly commensurate with the value of the services rendered". For that reason the Indus-

trial Commissioner and the wage boards that he appoints are directed to investigate "the amount sufficient to provide adequate maintenance and to protect the health" of women and minors, and "the value of the service or class of service rendered" by them and to fix wages accordingly.

There is no finding that the wages of men are insufficient and there is no direction or authorization to investigate or to take into account the amount necessary to protect the health of men or the value of the service that they render.

How different from the careful consideration of the affected employers and employees provided by the Washington minimum wage statute for women held valid by this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379! In that case this Court, explaining its conclusions, said at p. 396:

> "The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service."

The same comments might be made of the New York Minimum Wage Law in so far as women are concerned. The fact that these provisions of the statute were so relied upon by this Court in deciding that the statute did not offend due process, serves to emphasize the absence of any such provisions in respect of this employer and its employees.

The arbitrary character of Section 663-a is sharply illustrated by this case.

The women for whom wages were fixed by Mandatory Order 6-a are able-bodied women, for handicapped women

are permitted special licenses under Section 658. The principal work for which appellant employs men is bed-making. Obviously an able-bodied woman can make far more beds than a decrepit man.

Further, an able-bodied woman may have a family; she may become a mother; she needs more to eat than a frail old man, a drifter separated from his family, and who certainly will never produce children. Moreover, such matters as meals, shifts and uniforms may well involve different considerations with respect to women.

In *West Coast Hotel Co.* v. *Parrish, supra,* this Court upheld minimum wage laws for women on the ground, among others, that "What these workers lose in wages the taxpayers are called upon to pay" (p. 399).

On the other hand, in this instance it is only because men can get extremely cheap lodging, and some of them can get work at those lodgings, that they do not have to be supported by public funds and kept in public institutions, as emphasized in the dissenting opinion of Judge Van Voorhis.

But whatever may be true in a particular case, appellant submits that it is fundamentally arbitrary that the duties of one employer, or of any person, should depend upon the circumstances of another.

Governor Lehman undoubtedly had this aspect of the law in mind when he said in his veto message (Appendix D, p. 16a):

> "It deprives the industries affected of any opportunity to be heard."

Conceding *arguendo* that a wage board or the Board of Standards and Appeals might be willing to listen to appellant, those boards could in no way take into account what appellant might have to say about its own conditions of employment, for those conditions are by law wholly irrelevant to the board's decision. Under such circumstances it is rightly said, as Governor Lehman did say, that employers such as appellant have not had an opportunity to

be heard. Cf. *Morgan v. United States*, 298 U. S. 468, 479-482.

There are of course many cases in which the Court has held state statutes unconstitutional on the ground that they were arbitrary; we shall not attempt to discuss these cases except to refer to *Hoeper* v. *Tax Commission*, 284 U. S. 206. In that case this Court held unconstitutional a Wisconsin statute taxing men partly on the basis of their wives' income. This Court said at p. 215:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

POINT II

In permitting the employment of handicapped women at less than prescribed minimum wages, while forbidding such employment of handicapped men, the statute denies the employers of handicapped men the equal protection of the laws.

As previously noted, Section 658 (Appendix E, p. 24a) authorizes women "whose earning capacity is impaired by age or physical or mental deficiency or injury" to obtain special licenses for employment at less than minimum wages.

Comparable provisions are found in most minimum wage laws. The Fair Labor Standards Act, enacted in 1938, adopted the precise language quoted above from Section 658 (29 U. S. C. § 214). The Fair Labor Standards Act, however, permits such licenses for both men and women.

No similar exemption is granted to handicapped men by the New York law. Therefore, employers of handicapped men, unlike employers of handicapped women, cannot engage their services at less than the minimum wage.

As this Court said in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

The failure to provide for special licenses for handicapped men, whilst providing such licenses for handicapped women, effects a classification of a most arbitrary nature, having no relation to the object of the legislation; indeed, that object would seem more likely to be achieved by the reverse classification.

The irrelevance of the classification to the object of the Minimum Wage Law is accentuated by the fact that appellant does not employ and is forbidden to employ any women whatever, whether able-bodied or handicapped.

Although this point was argued in the Court below, appellee did not attempt to maintain that the classification was a reasonable one.

Appellee argued, rather, a fact previously unknown to appellant, that in some instances he had granted such licenses to handicapped men. But the statute makes no provision for such licenses.

Obviously the assumption by appellee of an arbitrary, extra-legal power, exerted according to his own whim, does not provide the "equal protection of the *laws*" required by the Fourteenth Amendment.

The Court itself made no mention of the subject in its opinion. In short, although invited to do so by his argument, the Court did not sanction appellee's capricious practice.

POINT III

To equate men's wages with those of women in an activity which does not employ women, has never employed women and is forbidden by law to employ women, does not protect women and hence, on the facts of this case, does not "have a real and substantial relation to the object sought to be obtained" by the Minimum Wage Law.

In *Nebbia* v. *New York*, 291 U. S. 502, this Court summarized the test of compliance with due proces in the field of economic regulation as follows, at p. 525:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that *the means selected shall have a real and substantial relation to the object sought to be attained.* It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Although in recent years the courts have tended to find the existence of "real and substantial relation" more readily than in former times, the test itself has never been overruled.

Consequently opinions and briefs considering the validity of statutes in the field of economic regulation usually have consisted largely of an analysis of the factual situation to show that the statute does, or does not, have a real and substantial relation to a lawful legislative end.

The briefs submitted in *Stettler* v. *Oregon*, 243 U. S. 629, originally written by Mr. Louis D. Brandeis, and revised for the reargument by Mr. Felix Frankfurter, both of whom were later appointed to this Court, and in *Adkins* v. *Children's Hospital*, 261 U. S. 525, written by Mr. Frankfurter, both of which are minimum wage cases previously heard by this Court, are notable illustrations of the foregoing statement.

In this case, on the contrary, neither the appellee nor the courts below have attempted to show how the regulation of the wages paid to men by employers who do not employ women, have never employed women and are forbidden by law to employ women could possibly protect women, or indeed in any way affect their compensation or their opportunities for employment.

The absence of any attempt is due to the manifest absurdity of such a thesis.

The Court below did not deal with appellant's foregoing argument on the merits, but, apparently in response to this argument, made reference to Section 110 of the Labor Law.

POINT IV

The purported remedy under Section 110 is illusory; that remedy cannot be used to secure exemption for employees once Section 663-a is held constitutional, and the Court ruled against its invocation as concerns the inclusion of plaintiff's lodging houses.

The majority opinion at p. 4a suggests that appellant may have some remedy under Section 110 of the Labor Law.

This suggestion does not mean that the Court has held that the question of the constitutionality of the application

of Section 662-a was not properly before it in this suit. On the contrary, the Court says at p. 5a:

> "We will assume that the question as to whether section 663-a is itself unconstitutional may be raised in the first instance by a suit such as the present one (Matter of Diocese of Rochester v. Planning Bd. of Brighton, 1 N. Y. 2d 508, 519, 520) but if we are right in what we have said above, there is no such unconstitutionality."

In *Diocese of Rochester* the Court had said at pp. 519-520:

> "It is a general rule that a party cannot, in the same proceeding, rely upon a statute or retain benefits thereunder and attack its constitutionality [citations]. The proper way to raise the constitutional question is by way of a separate action or proceeding [citations]. * * *"

This plenary action is thus the only form of action under New York practice in which appellant can attack the constitutionality of Section 663-a as applied to it.

Accordingly, it is difficult to understand the Court's indication that relief is possible under Section 110. Certainly whatever relief is available under that Section, it is not the relief sought by appellant in this proceeding, *viz.*, an injunction against the enforcement of Section 663-a on the ground that Section 663-a is unconstitutional as applied to it.

Be that as it may, it is apparent that appellant cannot secure relief under Section 110.

By Section 110 of the Labor Law:

> "1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the validity or reasonableness of any rule or order made under the provisions of this chapter."

The scope of this review is defined by Section 662 as follows:

> "All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be no appeal from his decision on any such question of fact, but there shall be a right of review by the board of standards and appeals as provided in section one hundred and ten, article three of the labor law."

Now assuming Section 663-a to be constitutional, as the Court of Appeals held, there is no ground on which appellant could attack Mandatory Order 6-a or its successor, Mandatory Order 6-c.

Validity as applied to these employees. Appellant might overwhelmingly persuade the Board of Standards and Appeals that the wages specified in Mandatory Order 6-a, now 6-c, were inappropriate for lodging house employees but that would not enable the Board to modify the Order so as to exempt appellant and its employees. *The Orders by their terms apply only to women and minors; their applicability to men is a matter of the legal effect of Section 663-a.* Cf. Mandatory Order 6-c, *supra*, p. 8. The legal effect of Section 663-a with respect to an order valid according to its terms is a matter obviously beyond the control of the Board of Standards and Appeals.

Validity as applied to lodging houses. Theoretically another attack on Mandatory Order 6-a, or 6-c, could be made in respect of its definition of hotels so as to include lodging houses. But the Court of Appeals has itself forestalled any such attack.

Although it is true that the Court says in its opinion at Appendix A, p. 5a:

> "As indicated above we do not reach, in a suit like this, the questions (aside from unconstitutionality of section 663-a) of invalidity or unreasonableness of the application of this Order to plaintiff's lodging houses."

This statement appears to leave open to plaintiff the claim in a Section 110 proceeding that its lodging houses could not lawfully be included in Mandatory Order 6-a or 6-c. But the Court promptly proceeds to dash this possibility by the sentence immediately following, Appendix A, pp. 5a-6a:

> "*If we were to reach any such question we would say* that the orders are not invalid at the point where they include these lodging houses as hotels."

Why questions require plenary consideration.

The foregoing statement of points demonstrates, we submit, that a state court of last resort erred in failing to hold a state statute repugnant to the United States Constitution. The intrinsic importance of such an error is such that plenary consideration is required.

(i) A copy of the judgment appealed from.

Copies of the original and amended remittiturs (judgments) of the Court of Appeals are appended as Appendix I, pp. 32a-35a.

November 15, 1957.

Respectfully submitted,

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APPENDIX A

Majority Opinion of Court of Appeals

DESMOND, *J.*:

Plaintiff operates, in New York City, twenty cheap (35¢ to 60¢ per night) men's lodging houses out of a total of about sixty such establishments on the Bowery and in other similar localities in the city. This suit was brought to have declared invalid and to restrain the enforcement as against plaintiff of mandatory wage order No. 6-a established by respondent State Industrial Commissioner in 1947 for the hotel industry. The order contains a definition of "hotel industry" which in terms includes "lodging houses" and the Commissioner has announced his intention to enforce the order as against "flop houses" such as those conducted by plaintiff although no women are employed therein. The Commissioner's justification for this is section 663-a of the Labor Law which is part of article 19 and is quoted below. Article 19 is headed "Minimum Wage Standards for Women and Minors" and contains section 650 which recites the factual background of the legislation and section 651 which states it to be the public policy of the State of New York that women and minors should receive wages sufficient to provide adequate maintenance and to protect their health. Although in terms and purpose article 19 is for the protection of women and minors only, the Legislature considered it appropriate, in order to strengthen this protection for women and minors, to enact section 663-a which is headed "Supplementary protection" and in applicable part is as follows:

> "To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors, no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order."

Appendix A
(Majority Opinion of Court of Appeals)

Section 663-a (and a predecessor section to the same effect) has been in effect since 1944 although other parts of article 19 were enacted in 1937.

The idea back of section 663-a is plain enough. The Legislature, intent on providing wage and hour protection for employed women and minors, realized that this objective could not be realized if men workers could take the same jobs at wages lower than those set for women and children. If that kind of wage competition between men and women were not eliminated the result of a minimum wage order for women might be that their last state would be worse than their first. They would be out of jobs. Thus, section 663-a, although it deals directly with wages of men rather than of women, has a reasonable relation to the enforcement of the general policy of protecting women and minors in industry. *Mary Lincoln Candies* v. *Department of Labor* (289 N. Y. 262) is interesting in this connection. That case held to be valid so much of a wage order for women in the candy industry as not only fixed a minimum hourly rate for women employees but required an employer to pay that minimum hourly rate for a minimum number of hours per week. There was and is nothing in article 19 which specifically authorized the guaranty of a number of hours of work but, nonetheless, we said (in *Mary Lincoln Candies*) that the candy industry order validly mandated a minimum number of hours for women workers since such a provision was reasonably necessary to carry out the statutory purpose of guaranteeing to women workers a living wage. The present case is stronger for the State than was *Mary Lincoln Candies* (*supra*) since the prohibition here against men working for less than the minimum wages fixed for women and children is not in the order but in the statute itself.

Appellant says that section 663-a is unconstitutional as interfering with freedom of contract. Certainly, that argu-

ment as to minimum wage legislation for women and children can no longer be made since *West Coast Hotel Co.* v. *Parrish* (300 U. S. 379) and *Mary Lincoln Candies* v. *Department of Labor* (289 N. Y. 262, *supra*) in this court (see also *People* v. *Beck*, 288 N. Y. 569, certiorari denied 317 U. S. 696). But, says plaintiff-appellant, section 663-a is not a minimum wage act for women and children but is an unconstitutional general minimum wage act for men. The first answer to that argument of unconstitutionality is that section 663-a is not such a general statute since its prohibition runs against the employment of men in certain regulated industries at wages lower than those fixed for women in the same industries. In the second place, it is by no means clear that a State general minimum wage act for men would be unconstitutional. In *United States* v. *Darby* (312 U. S. 100) which held valid the Federal Fair Labor Standards Act, Justice Stone for a unanimous court said at page 125 that since *West Coast Hotel Co.* v. *Parrish* (*supra*) it "is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the 5th more than the 14th amendment. At another place on the same page in the *Darby* opinion Justice Stone wrote: "Similarly the statute is not objectionable because applied alike to both men and women". In other parts of the *Darby* opinion the Supreme Court was talking about the constitutional question of Federal power to bar from interstate commerce articles produced in the States at substandard wages, but at the places quoted (in the *Darby* opinion) the Supreme Court was addressing itself to a due process argument like that made in the present case. The Supreme Court's answer to that argument in *Darby* was that a minimum wage fixing law is within the legislative power of the States and not objectionable because applied to men as well as to women (see, more recently, *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 536).

Appendix A
(Majority Opinion of Court of Appeals)

Actually, appellant at one point in its brief seems to concede the power of the State to pass even a general wage law for men but points out that this wage order as applied to men contains no safeguards of notice, hearing, decisions of wage boards, etc., such as are required by article 19 in connection with fixing the wages for women and children. This raises no constitutional question. The wage board before making its recommendations to the Commissioner as to minima must give notice and hold hearings, etc. Account must be taken of the sums necessary for adequate maintenance and health of the woman worker, the value of her services and the wages paid in the State for similar work (Labor Law, §§ 650, 656). All these procedures were had in the present case as to women and children. Then the board and the Commissioner from the testimony at these hearings determined what would be a proper minimum wage for women in the industry. That wage was by the statute's own command made applicable, however, as a minimum for men working in the same occupation. Surely, the Legislature could take notice that the needs of men for maintenance and health are not less than that of women and that the value of the services of men and the wages ordinarily paid to men in a given industry are not less than those of women.

Elsewhere in its brief appellant argues that this minimum wage order is unconstitutional as applied by the Commissioner to lodging houses like plaintiff's since, in fact, no women are employed in those places. But as to that plaintiff, in bringing this suit, has invoked the wrong forum. Section 662 of the Labor Law (part of art. 19) says that such wage orders may be reviewed by the Board of Standards and Appeals as provided in section 110 of the Labor Law. Section 110 says that any person in interest may petition the Board of Standards and Appeals for a review of the validity or reasonableness of any rule or order

"made under the Labor Law". Going back to section 662, there is a provision that any appeal from the determination of the Board of Standards and Appeals on a question of law is to be taken to the Appellate Division, Third Department. Reading together sections 110 and 662 we find that on any question of fact the determination of the Commissioner is final and that a party seeking to review the validity or reasonableness of any wage order or any part thereof must, before going to the courts, seek a review before the Board of Standards and Appeals. Plaintiff did not do so but instead brought this direct suit. We will assume that the question as to whether section 663-a is itself unconstitutional may be raised in the first instance by a suit such as the present one (*Matter of Diocese of Rochester* v. *Planning Bd. of Brighton* (1 N. Y. 2d 508, 519, 520) but if we are right in what we have said above, there is no such unconstitutionality. But, besides urging such alleged unconstitutionality of the statute, plaintiff asserts that the wage order is invalid since it is made to apply to establishments like plaintiff's where no women are employed. Plaintiff says also that it is unreasonable or unlawful to include establishments like plaintiff's under the term "hotels", since these cheap lodging houses give no services at all to their customers beyond providing beds. Those latter are the sort of claims of invalidity or unreasonableness which under sections 110 and 662 (*supra*) must be raised first by administrative review before the Board of Standards and Appeals (see *Richfield Oil Co.* v. *City of Syracuse*, 287 N. Y. 234; *Dun & Bradstreet* v. *City of New York*, 276 N. Y. 198; *Lewis* v. *City of Lockport*, 276 N. Y. 336; as to wage orders see *People* v. *Beck*, 288 N. Y. 569, *supra*).

As indicated above we do not reach, in a suit like this, the questions (aside from unconstitutionality of section 663-a) of invalidity or unreasonableness of the application of this order to plaintiff's lodging houses. If we were to reach any such question we would say that the orders are

not invalid at the point where they include these lodging houses as "hotels". This record shows that these places in their own advertising and signs call themselves "hotels". The Commissioner is not holding that these places compare with the luxury hotels. He has made a finding and an order that the minimum wage for women and children in any place of public lodging should be not less than a fixed amount per hour for women and children and that, to supplement this protection for women and children, men, too, should pursuant to the statute be forbidden to work for wages below those minima.

Plaintiff's counsel on argument before us suggested that this order as applied to plaintiff's lodging houses is unreasonable and invalid if not unconstitutional in that it would require plaintiff to pay standard wages to the homeless drifters who make up not only plaintiff's clientele but his labor force. The only employees plaintiff's operations need are bed makers and clerks and it recruits these from among the lodgers themselves, paying the clerks about $2.95 a day and the bed makers from $1.95 to $2.95 per day. The suggestion is that plaintiff will not be able to carry on its business if it is required to pay the minimum wages fixed by this order. That, however, does not make the order unconstitutional. Such hardship is no argument against the constitutional validity of an otherwise valid exercise of the State's police power (*Hegeman Farms* v. *Baldwin*, 293 U. S. 163, 170; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 102).

The judgment appealed from should be affirmed, with costs.

APPENDIX B

Dissenting Opinion in Court of Appeals

VAN VOORHIS, J. (dissenting):

This appeal involves minimum wages of male employees in men's lodging houses on the Bowery in New York City. There are sixty or more of such establishments in the City, supplying about 12,000 beds. These places do not admit women or minors. They cater only to men in the lowest strata of society, who are aged, homeless or destitute. These men cannot afford the price of ordinary hotel accommodations, but have old age assistance or sufficient other means to keep from becoming public charges. Some of the frequenters of these lodging houses are employed to perform necessary menial tasks in them at a small wage, such as bed making or cleaning the floors. This makes it possible to accept male lodgers at low rates by reducing the operating expenses.

Section 663-a of the Labor Law, enacted in 1944, provides that no male twenty-one years of age or over "shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order." Although no women or minors are employed in this occupation, these "flop houses" have been classified as hotels by the Industrial Commissioner, with the consequence that the men who perform these menial tasks are legally required to be paid as much as women receive under employment in hotels. These establishments are hotels in name only, having probably been so designated by their owners in deference to the personal morale of those who inhabit them. They provide none of the services ordinarily furnished by hotels, unless an army barracks may be classified as a hotel. The validity and applicability of section 663-a and these Administrative rulings is challenged as applied to this situation.

Appendix B

(Dissenting Opinion in Court of Appeals)

Section 663-a does not purport to be a general minimum wage law for men. It leaves uncovered many fields in which men alone are employed. It does not define what occupations are affected or are left unaffected. It bears no relation to the health, safety, morals or welfare of men. Its purpose is to increase the number of jobs available to women, by eliminating wage competition with men as a consequence of prescribing minimum wages for women. Its object is solely to make more jobs for women by eliminating wage competition with men. If this case came within its scope and purpose, it would provide more jobs for women by eliminating competition with men for jobs as domestics in lodging houses on the Bowery. Yet there no employment by women is permitted. Women are forbidden to fill these positions by municipal regulation under penal sanctions. This demonstrates, as it seems to me, that this statute cannot possibly have been designed to cover this situation.

If this section is to be construed as including such employees, its constitutionality would be open to question. It confuses the issue to treat section 663-a as a male minimum wage law. If it were, its validity might be upheld on the basis that it was reasonably related to some actual or manifest evil (*Defiance Milk Products* v. *DuMond*, 309 N. Y. 537), viz., the payment to men of less than a living wage. But this statute does not purport to prevent the payment of less than a living wage to men who are engaged in occupations in which women are not employed. Its purpose and effect is the same as though it provided that occupations in which women are engaged shall be reserved for women, at least to the extent of not being available to men at lower wages. Whatever relation to the police power this statute could have arises by reason of its effect upon women not upon men. It is not equivalent to a statute requiring equal pay to women for equal work with men. Its effect is to insist that these men shall be paid more than

Appendix B
(Dissenting Opinion in Court of Appeals)

their services are worth, for the reason that it would endanger the morals or health of women if they were similarly circumstanced. That has nothing to do with increasing the pay of these casual, part time employees which can only result in increasing rates for lodging to be paid by these and other unfortunates and turning them out into the street.

The judgment appealed from should be reversed with costs in all courts and relief granted as demanded in the complaint.

• • •

APPENDIX C

Opinion at Special Term

In June, 1944, defendant State Industrial Commissioner promulgated his "Mandatory order No. 6 governing minimum wage standards in the hotel industry." He therein defined the term "hotel industry" as including "any establishment which, as a whole or part of its business activities, offers lodging accommodations for hire to the public, to employees, or to members or guests of members." At the end of the order as printed and sent by the commissioner to establishments in the industry as so defined there are the statements that the provisions of the order apply to males twenty-one years of age or over as well as to women and minors and that failure to pay the rates established is a misdemeanor punishable by fine and imprisonment.

The commissioner thus in effect has fixed minimum wages for men as well as for women and minors, and made the wages so fixed applicable to every establishment where lodging accommodations are offered to the public.

An owner and operator of men's lodging houses in the City of New York, on behalf of itself and of other such owners and operators, here asserts that the commissioner's order is illegal and invalid and prays for a declaration of such invalidity and an injunction enjoining enforcement of the order as against men's lodging houses.

The commissioner clearly has authority to establish minimum wages for women and minors (West Coast Hotel Co. v. Parrish, 300 U. S., 379; Labor Law, Art 19, Laws 1937, c. 276; People, &c., v. Beck, 288 N. Y., 569, 672, certiorari denied 317 U. S., 696).

New York has not adopted a general minimum wage law for men, and perhaps accurately can be said to have studiously refrained from adopting one; but by Laws 1944, chapter 792, the Legislature inserted in article 19 of the Labor Law dealing with minimum wages for women and

minors a new section, section 563-a (renumbered 663-a by Laws 1948, c. 353) entitled "Supplementary Protection," by which it enacted: "To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors, no male 21 years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order."

Thus, while not itself establishing minimum wages for men, the Legislature said in clear and explicit language that when the commissioner fixes minimum wages for women and minors in a particular occupation it then shall be unlawful to pay to men in that particular occupation a wage less than the minimum which the commissioner has fixed for women and minors in that occupation. In that sense, and to that extent, therefore, the Legislature has provided a minimum wage for men; and I think there can be no doubt as to the validity of that legislation.

Plaintiff argues that it is unconstitutional to establish a minimum wage for men, but I think that argument already has been rejected in United States v. Darby (312 U. S., 100); for in that case the court sustained the constitutional validity of an act of Congress, the Fair Labor Standards Act, which prescribed minimum wages and maximum hours for both men and women and excluded from interstate commerce goods produced by persons who received less than such minimum wages or worked more than such maximum hours. The court specifically stated that the statute was not objectionable because applied alike to both men and women (p. 125).

As an act of Congress prescribing minimum wages for men does not violate the Fifth Amendment, I think it necessarily follows that a state statute prescribing minimum wages for men does not violate the Fourteenth Amendment.

Plaintiff argues that section 663-a is invalid because it does not contain any legislative finding of fact or declara-

tion of policy such as is contained in Laws of 1937, chapter 276. I think that entirely fallacious.

When the validity of legislation depends upon the existence of a certain state of facts or the reasonableness of its relation to the end sought to be obtained, a legislative finding that such state of facts or such reasonableness of relation exists frequently is of great assistance in sustaining the validity of the legislation, and in a doubtful case the presence or absence thereof may turn the scale one way or the other; but I think it never yet has been held, and that it should not be held, that such a legislative finding or declaration of policy is essential to the validity of the legislation. The validity thereof depends upon the existence of such state of facts or of such reasonableness of relation and not upon the presence or absence of a legislative finding upon the subject; and if the court, by any proper judicial procedure, can satisfy itself of the existence of the state of facts or the reasonableness of relation it will sustain the legislation despite the absence of any legislative finding or declaration. Somewhat differently phrased, the legislation will be sustained, in the absence of a clear showing, by legislative finding or otherwise, that the state of facts or relation cannot possibly exist.

The statute itself being valid, the next question is whether or not the commissioner's order is valid.

It is quite true, as plaintiff argues, that lodging houses are not hotels under either the common law conception of hotels or under the definitions contained in many statutes (Dixon v. Robbins, 246 N. Y., 169; Lyoles Realty Corp'n v. Cannella, 73 N. Y. Supp., 2d, 10, 14; Alsberg v. Lucerne Hotel Co., 46 Misc., 617; General Business Law, sec. 205; Multiple Dwelling Law, sec. 4), but that does not seem to me to be of any real significance. The commissioner was not bound to adopt that common law conception or those statutory definitions of hotels, and the validity of his order depends, not upon whether in including lodging houses in

Appendix C
(Opinion at Special Term)

the hotel industry, he made a scientifically correct definition, but upon whether the effect of his order, in conjunction with section 663-a, is to establish minimum wages for men in occupations other than the occupations as to which he has established minimum wages for women and minors; and as applied to this case that means, as I see it, whether the bedmakers and clerks in Bowery lodging houses are in the same occupation as the host of women and minors who are employed as chambermaids, waitresses, clerks, &c., in fine and expensive hostelries. That there are material differences seems manifest, but courts are not permitted to inquire into the wisdom of the commissioner's order. Courts can inquire only as to the legality thereof, and I cannot say that in including Bowery lodging houses in his definition of the "hotel industry" the commissioner exceeded his jurisdiction or was arbitrary or capricious.

Plaintiff stresses the fact that lodging houses do not employ women or minors and actually are prohibited by law from so doing; but that, again, seems to me to be of no significance.

The definition of occupation in section 652 as meaning "an industry, trade, business or class of work in which women and minors are gainfully employed" was appropriate enough in article 19 as originally enacted by Laws 1937, chapter 276, for it then was a statute authorizing minimum wages for women and minors only; but I think it would be a perversion of plain legislative intent to apply the definition to the entire new section inserted in article 19 seven years later by Laws 1944, chapter 792. The aim of that new section was to safeguard the minimum wages which the commissioner prescribed for women and minors in particular occupations by prohibiting the employment of men in those occupations at wages less than the minimum which the commissioner had prescribed for women and minors; and the word occupation in that new section means class

of work, regardless of who is employed therein. As I find that it was not illegal for the commissioner to treat bed-makers and clerks in Bowery lodging houses as being engaged in the same class of work as chambermaids, waitresses, clerks, &c., employed in fine and expensive hostelries, it is immaterial that the bed-makers and clerks in such lodging houses do not include women or minors.

I find no invalidity in the commissioner's order and the complaint accordingly must be and is dismissed.

The foregoing constitutes the decision required by the Civil Practice Act and judgment is to be entered thereon.

APPENDIX D

Veto Message of Governor Lehman

PUBLIC PAPERS OF GOVERNOR LEHMAN

1942, pages 228-229

To Amend the Labor Law, in Relation to Supplementary Protection of Minimum Wage Standards

STATE OF NEW YORK—EXECUTIVE CHAMBER

Albany, April 11, 1942

To the Senate:

I am returning herewith, without my approval, Senate Bill, Int. No. 658, Pr. No. 1855, entitled:

"AN ACT to amend the labor law, in relation to supplementary protection of minimum wage standards."

NOT APPROVED.

New York State's Minimum Wage Law has had a long history of litigation. It was first adopted in 1933 but declared unconstitutional in 1936.

The present law which was adopted in 1937 is the result of long and careful study and draftsmanship by many distinguished experts in the field of minimum wage legislation. It has been sustained by the courts. Our law provides for the establishment of minimum wages for women and minors only. It does not provide for the setting of minimum wages for men. Men were deliberately omitted from the act because it was probable that their inclusion would weaken the constitutionality of the act.

Appendix D

(Veto Message of Governor Lehman)

In a formal statement issued while the present act was pending before the Legislature, the President of the New York State Federation of Labor stated:

> Labor in this State is opposed absolutely to any provision for the inclusion of men in this proposed legislation.
>
> First, because the inclusion of men in the law might result in the courts again declaring it unconstitutional and
>
> Second, because it has been a fundamental policy of organized labor for many years to attain its ends by real collective bargaining whenever possible. Labor organizations of men in this State have, by a long established collective bargaining relationship, secured wages and conditions that are superior to those in most of the other states in this country. Any attempt to apply the principle of minimum wage laws to men could do naught but harm to these established wages and conditions. On the other hand women workers in this State have long suffered from a lack of real bargaining power and as a result have been compelled to work under miserable conditions and starvation wages in many industries.

This bill by indirection makes the Minimum Wage Law applicable to men. It seeks to accomplish what we carefully avoided in doing in drafting the present law.

In addition, the bill has many defects. Because it is immediately effective, it would upon enactment, automatically and without notice, make criminals of persons who have not heretofore adopted the wage scaled in the present law. It was drafted without any consideration of the problems involved. It contains none of the carefully worked out safeguards and procedures of the present law. It deprives the industries affected of any opportunity to be heard.

The bill is disapproved.

(signed) HERBERT H. LEHMAN

APPENDIX E

Article 19 of Labor Law

650. FACTUAL BACKGROUND

Women and minors are employed in some occupations in the state of New York for wages insufficient to provide adequate maintenance and to protect health and unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Women and minors employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to be insufficient to provide adequate maintenance and to protect health and to bear no relation to the fair value of the services rendered. Women and minors employed for gain in such occupations are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers and employees, reduces the purchasing power of the workers, threatens the stability of industry and in many instances requires such wages to be supplemented by the payment of public moneys for relief or other public assistance. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are contrary

to public policy and are such as to render imperative the reasonable exercise of the police power of the state to secure wages sufficient to provide adequate maintenance and to protect the health of women and minors, and to protect the public interest of the community at large in their health and well-being, as well as for the protection of trade and industry.

§ 651. Statement of public policy

It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health.

§ 652. Definitions

As used in this article: 1. "Commissioner" shall mean the industrial commissioner.

2. "Division" shall mean the division of minimum wage.

3. "Wage board" shall mean a board created as provided in this article.

4. "Woman" shall mean a female of twenty-one years or over.

5. "Minor" shall mean a person of either sex under the age of twenty-one years.

6. "Occupation" shall mean an industry, trade, business or class of work in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm.

Appendix E
(Article 19 of Labor Law)

§ 653. POWERS OF INVESTIGATION

The commissioner shall have power: 1. To investigate and ascertain the wages of women and minors employed in any occupation in the state;

2. To enter the place of business or employment of any employer of women and minors in any occupation for the purpose of

a. examining and inspecting any and all books, registers, payrolls, and other records of any employer of women or minors that in any way appertain to or have a bearing upon the wages of any such women or minors,

b. ascertaining whether the orders of the commissioner have been and are being complied with;

3. To require from such employer full and correct statements in writing, at such times as the commissioner may deem necessary, of the wages paid to all women and minors in his employment.

§ 654. INVESTIGATION OF OCCUPATION

The commissioner shall have power, and it shall be the duty of the commissioner on the petition of fifty or more residents of the state engaged in or affected by an occupation sought to be investigated, to cause an investigation to be made of the wages being paid to women or minors in any occupation to ascertain whether any substantial number of women or minors in such occupation are receiving wages which are insufficient to provide adequate maintenance and to protect their health. If, on the basis of information in his possession, with or without a special investigation, the commissioner is of the opinion that any substantial number of women or minors in any occupation

Appendix E
(Article 19 of Labor Law)

or occupations are receiving such wages, he shall appoint a wage board to report upon the establishment of minimum wages for such women or minors in such occupation or occupations.

§ 655. Basis of minimum wage

In establishing a minimum wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure:

(1) may take into account the amount sufficient to provide adequate maintenance and to protect health

(2) may take into account the value of the service or class of service rendered, and

(3) may consider the wages paid in the state for work of like or comparable character.

§ 656. Wage boards

1. A wage board shall be composed of not more than three representatives of employers, an equal number of representatives of employees and of not more than three disinterested persons representing the public, one of whom shall be designated by the commissioner as chairman. The commissioner shall appoint the members of such wage board, the representatives of the employers and employees to be selected so far as practicable from nominations submitted by employers and employees in such occupation or occupations. Two-thirds of the members of such wage board shall constitute a quorum and the recommendations or report of such wage board shall require a vote of no less than a majority of all its members. The members of

Appendix E
(Article 19 of Labor Law)

a wage board shall be entitled to compensation at the rate of not exceeding ten dollars per day for each meeting attended by them, or each day actually spent in the work of the board. They shall also be paid their reasonable and necessary traveling and other expenses while engaged in the performance of their duties. The commissioner shall make and establish from time to time rules and regulations not inconsistent with this article governing the selection of a wage board and its mode of procedure.

2. The commissioner shall present to a wage board promptly upon its organization all the evidence and information in his possession relating to the wages of women and minor workers in the occupation or occupations for which the wage board was appointed and all other information which he may deem relevant to the establishment of a minimum wage for such women and minors, and shall cause to be brought before the wage board any witnesses whom he may deem material. A wage board may summon other witnesses or call upon the commissioner to furnish additional information to aid it in its deliberation.

3. A wage board shall have power to administer oaths and to require by subpoena the attendance and testimony of witnesses, and the production of all books, records, and other evidence relative to any matters under investigation. Such subpoenas shall be signed and issued by the chairman of the wage board and shall be served and have the same effect as if issued out of the supreme court. A wage board shall have power to cause depositions of witnesses residing within or without the state to be taken in the manner prescribed for like depositions in civil actions in the supreme court.

4. Within ninety days of its organization a wage board shall submit a report including its recommendations as to

Appendix E
(Article 19 of Labor Law)

minimum wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may in his discretion extend to one hundred and eighty days the time in which the report shall be submitted, and if its report is not submitted within such time the commissioner may appoint a new wage board. Together with its report, the board shall submit a record of its activities.

5. The minimum wage standard recommended by a wage board shall not be in excess of an amount sufficient to provide adequate maintenance and to protect the health of the women and minors so employed.

6. A wage board may classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum wage rates for different classes of employment. A wage board may also recommend minimum wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

7. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the minimum wage rates recommended for experienced women or minor workers in such occupation or occupations.

8. In addition to the report a wage board may recommend such regulations as it may deem appropriate to safeguard the minimum wage standards recommended in its report. Such regulations may among other things define

Appendix E
(Article 19 of Labor Law)

and govern learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, without departing from the basic minimum rates recommended by the wage board the board may provide for such modifications or reductions of or additions to such rates in or for such special cases or classes of cases as those herein enumerated as the board may find appropriate to safe-guard the basic minimum rates established.

9. A wage board shall conduct public hearings, giving due notice to all interested parties, during its investigations prior to its report and recommendations. The testimony at such public hearings shall be submitted to the commissioner together with its report and recommendations.

§ 657. Action on report of wage board

A wage board shall submit its report and recommendations to the commissioner who shall file with the secretary of the department of labor the report together with such of the regulations recommended by the board and with such modifications and amendments to the regulations or order as he may approve and then conduct public hearings giving due notice thereof to all interested parties. The commissioner shall within thirty days after such hearings accept or reject such report either in whole or in part. He may at any time confer with the wage board which may make such changes in the report or recommendations as it may deem fit.

Appendix E
(Article 19 of Labor Law)

If the report is rejected the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is accepted, either in whole or in part the commissioner shall make a minimum wage order which shall define minimum wage rates in the occupation or occupations as recommended in the report of the wage board and shall include the regulations as approved by the commissioner, such order to be effective sixty days from the date of making thereof.

§ 658. SPECIAL LICENSES

For any occupation for which minimum wage rates have been established the commissioner may cause to be issued to a woman or minor, including a learner or apprentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum wage rates and for such period of time as shall be fixed by him and stated in the license.

§ 659. REPEALED.

§ 660. PUBLICATION OF NAMES OF EMPLOYERS NOT OBSERVING ORDER

If the commissioner has reason to believe that any employer is not observing the provisions of any minimum wage order, the commissioner may, on fifteen days' notice, summon such employer to appear to show cause why the name of such employer should not be published as having failed to observe the provisions of such order. After such hearing and the finding of non-observance of such order, the commissioner may cause to be published in a newspaper or newspapers published and circulating within the state of New York and/or in such other manner as he may deem appropriate, the name of any such employer or em-

ployers as having failed in the respects stated to observe the provisions of such order. Neither the commissioner nor any authorized representative of the commissioner, nor any newspaper publisher, proprietor, editor, nor any employee thereof shall be liable to an action for damages for publishing the name of any employer as provided for in this article, unless guilty of wilful misrepresentation.

§ 661. Reconsideration of minimum wage order

1. At any time after a minimum wage order has been in effect for six months or more, the commissioner on his own motion or on a petition of fifty or more residents of the state engaged in or affected by the occupation to which the order is applicable, may reconsider the minimum wage rates set therein and reconvene the same wage board or appoint a new wage board to recommend whether or not the rate or rates contained in such order should be modified. The report of such wage board shall be dealt with in the manner prescribed in section six hundred and fifty-seven of this chapter.

2. The commissioner may from time to time propose such modifications of or additions to any regulations included in any minimum wage order of the commissioner without reference to a wage board, as he may deem appropriate to effectuate the purposes of this article, provided such proposed modifications or additions could legally have been included in the original order, and shall give notice of a public hearing to be held not less than fifteen days after such publication at which all persons may be heard in respect to such proposed modifications or additions. After such hearing the commissioner may make an order putting into effect such of the proposed modifications of or additions to the regulations as he may deem appropriate.

Appendix E

(Article 19 of Labor Law)

§ 662. Review of orders

All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be no appeal from his decision on any such question of fact, but there shall be a right of review by the board of standards and appeals as provided in section one hundred and ten, article three of the labor law. Appeals from the determination of the board of standards and appeals shall be taken direct to the appellate division of the supreme court, third judicial department on any question of law included or embodied in any decision or order thus reviewed.

§ 663. Duty of employer

In every occupation every employer of women and minor workers shall keep a true and accurate record of the hours worked by each, the cash wages paid by him to each and such other information as the commissioner in his discretion shall deem material and necessary and shall furnish to the commissioner or any duly authorized representative upon demand a sworn statement of the same. Such records shall be open to inspection by the commissioner or any duly authorized representative at any reasonable time. Every employer subject to a minimum wage order shall keep a copy of such order posted in a conspicuous place in every room in which women or minors are employed. Employers shall on request be furnished copies of orders without charge. Employers shall permit the commissioner or any duly authorized representative to question any employee of such employer in the place of employment and during work hours in respect to the wages paid to and the hours worked by such employees or other employees.

§ 663-a. Supplementary protection

To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women

and minors, no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order. The provisions of sections six hundred sixty, six hundred sixty-two, six hundred sixty-three, six hundred sixty-four, and six hundred sixty-five of this article shall apply to any employer or his agent, or officer or agent of any corporation failing to comply with the provisions of this section or any minimum wage order.

§ 664. Penalties

1. Any employer or his agent, or the officer or agent of any corporation, who discharges or in any other manner discriminates against any employee because such employee has served or is about to serve on a wage board or has testified or is about to testify before any wage board or in any other investigation or proceeding under or related to this article or because such employer believes that said employee may serve on any wage board or may testify before any wage board or in any investigation or proceeding under this article shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars.

2. Any employer or the officer or agent of any corporation who pay or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a minimum wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each failure to pay any employee in any week the rate applicable under a minimum wage order or a rate in excess thereof shall constitute a separate offense.

Appendix E
(Article 19 of Labor Law)

3. Any employer or the officer or agent of any corporation who fails to keep the records required under this article or to furnish such records or any information required to be furnished under this article to the commissioner or any duly authorized representative upon request shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than twenty-five nor more than one hundred dollars, and each day's failure to keep the records requested under this article or to furnish such records or information to the commissioner or any duly authorized representative shall constitute a separate offense.

§ 665. CIVIL ACTION

If any woman or minor worker is paid by his employer less than the minimum wage to which he is entitled under or by virtue of a minimum wage order he may recover in a civil action the full amount of such minimum wage less any amount actually paid to him by the employer together with costs and such reasonable attorney's fees as may be allowed by the court, and any agreement between him and his employer to work for less than such minimum wage shall be no defense to such action. At the request of any woman or minor worker paid less than the minimum wage to which he was entitled under a minimum wage order the commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court.

APPENDIX F

Section 110 of Labor Law

§ 110. REVIEW BY BOARD OF STANDARDS AND APPEALS

1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the validity or reasonableness of any rule or order made under the provisions of this chapter.

2. The petition shall be verified, shall be filed in duplicate with the board of standards and appeals and shall state the rule or order proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections to the rule or order not raised in the petition shall be deemed waived. The board may join in one proceeding all petitions alleging invalidity or unreasonableness of substantially similar rules or orders. The filing of such petition shall operate to stay all proceedings against the petitioner under such rule or order until the determination of such review.

3. The board shall order a hearing if necessary to determine the issues raised, or if the issues have been considered in a prior proceeding the board may, without hearing, confirm its previous determination. Notice of the time and place of hearing shall be given to the petitioner and to such other persons as the board may determine.

4. If the board finds that the rule or order is invalid or unreasonable it shall revoke or amend the same.

5. The decision of the board shall be final unless within thirty days after it is filed one of the parties commences an action as provided in section one hundred and eleven.

APPENDIX G

Multiple Dwelling Law

§ 4. Definitions

14. A "lodging house" is a multiple dwelling, other than a hotel, a rooming house or a furnished room house, in which persons are housed for hire for a single night, or for less than a week at one time, or any part of which is let for any person to sleep in for any term less than a week.

§ 66. Lodging houses

5. The number of persons accommodated on any story in a lodging house shall not be greater than the sum of the following components.

a. Twenty-two persons for each full multiple of twenty-two inches in the smallest clear width of each means of egress approved by the department, other than a fire-escape.

b. Twenty persons for each lawful fire-escape accessible from such story if it is above the entrance story.

6. Existing cubicles complying with all other provisions of this section may be maintained, provided the top of the enclosure of every cubicle is at least two feet from the ceiling. Any rearrangement of existing cubicles that may be made necessary by the provisions of this section shall be lawful. Cubicles authorized by this section shall not be considered rooms or alcoves but parts of the rooms in which they are constructed.

7. The department shall cause all lodging houses to be inspected at intervals of three months or less. All sections and parts of every lodging house shall also be inspected by a clerk or watchman in the employ of the owner at least once in every two hours.

APPENDIX H

Regulations Governing Conduct and Maintenance of Lodging Houses

Section 4, Subdivision (e), Paragraph (4).

Only servants at work or lodgers accommodated as per paragraph (3) of this subdivision, shall be allowed in sleeping rooms during the four-hour period for airing, as specified in the permit issued for such lodging house. In any lodging house in which accommodations are provided for male lodgers, no female servants shall be employed; likewise, where accommodations are provided for female lodgers, no male servants shall be employed.

Section 4, Subdivision (o).

No Women or Children lodged.

In no lodging house in which men are lodged shall any women or girl be lodged or any boy under the age of sixteen years, unless accompanied by his father or legal male guardian.

APPENDIX I

Remittitur (Judgment) of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of May in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

THE HON. ALBERT CONWAY, Chief Judge, *Presiding.*

RAYMOND J. CANNON, Clerk.

Remittitur: May 24, 1957

No. 372

N. H. LYONS & CO., INC.,

Appellant,

vs.

EDWARD CORSI, as Industrial Commissioner of the State of New York,

Respondent.†

BE IT REMEMBERED, That on the 17th day of December in the year of our Lord one thousand nine hundred and

† Isador Lubin, present incumbent of the office of Industrial Commissioner, was substituted as defendant by order of the Supreme Court of New York made July 29, 1957.

Appendix I
Remittitur (Judgment) of the Court of Appeals

fifty-six, N. H. Lyons & Co., Inc., the appellant in this cause, came here unto the Court of Appeals, by Henry Alexander, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Edward Corsi, as Industrial Commissioner of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Jacob K. Javits, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joseph M. Callahan, of counsel for the appellant, and by Mr. Roy Wiedersum, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon,
Clerk of the Court of Appeals of the
State of New York.

Amended Remittitur (Judgment) of the Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of October, A. D. 1957.

Present, HON. ALBERT CONWAY, *Chief Judge, Presiding.*

Mo. No. 360

N. H. LYONS & CO., INC.,

Appellant,

vs.

EDWARD CORSI, as Industrial Commissioner of the State of New York,

Respondent.

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due delibration having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied with ten dollars costs and necessary printing disbursements, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Amended Remittitur (Judgment) of the Court of Appeals

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Whether section 663-a and Article 19 of the Labor Law, of which it is a part, interfered with plaintiff's right of contract and violated plaintiff's rights under the due process and equal protection provisions of the Fourteenth Amendment. This Court held that plaintiff's constitutional rights were not violated.

And the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball,
Deputy Clerk.

[The amendment to the remittitur is accomplished by attaching the foregoing document to the printed record of proceedings, with the original remittitur, and filing with the Clerk of the Supreme Court, New York County.]